

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

August 9, 2002

**DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS**

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: April 1, 2002

Case Number: VSO-0535

This Opinion concerns the eligibility of XXXXX (the individual) to hold an access authorization¹ under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." The individual's access authorization was suspended by the Manager of a Department of Energy (DOE) Operations Office (the Operations Office) pursuant to the provisions of Part 710. Based on the record before me, I am of the opinion that the individual's access authorization should not be restored.

I. Background

The individual is an employee of a contractor at a DOE facility. After the individual was convicted for Driving Under the Influence (DUI) in January 2000, the Operations Office conducted a Personnel Security Interview (PSI) with the individual on January 25, 2000. *See* DOE Exhibit 15. The individual gave his assurance in the interview that he would not "drink and drive anymore," *id.* at 25, and the Operations Office took no further action at that time. DOE Exhibit 14 at 1. In July 2001, the individual again was arrested and charged with DUI. Because the security concern remained unresolved after that PSI, the Operations Office requested that the individual be interviewed by a DOE consultant psychiatrist. The psychiatrist interviewed the individual on November 14, 2001, and thereafter issued an evaluation to the DOE. *See* DOE Exhibit 4. The Operations Office ultimately determined that the derogatory information concerning the individual created a substantial doubt about his eligibility for an access authorization, and that the doubt could not be resolved in a manner favorable to the individual. Accordingly, the Operations Office

¹Access authorization is defined as an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material. 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Opinion as access authorization or security clearance.

suspended the individual's access authorization, and proceeded to obtain authority from the Director of the Office of Safeguards and Security to initiate an administrative review proceeding.

The administrative review proceeding began with the issuance of a Notification Letter to the individual. *See* 10 C.F.R. § 710.21. That letter informed the individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for access authorization. The Notification Letter included a statement of that derogatory information and informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt regarding his eligibility for access authorization. The individual requested a hearing, and the Operations Office forwarded the individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Hearing Officer in this matter.

At the hearing convened pursuant to 10 C.F.R. § 710.25(e) and (g), the individual, his wife, a counselor who evaluated the individual, and the DOE consultant psychiatrist testified. Both the individual and the DOE Counsel submitted exhibits. I closed the record upon receiving the transcript of the hearing.

I have reviewed and carefully considered the evidence in the record. I have considered the evidence that raises a concern about the individual's eligibility to hold a DOE access authorization. I have also considered the evidence that mitigates that concern. And I conclude, based on the evidence before me and for the reasons explained below, that the security concern has not been resolved.

II. Analysis

A. The Basis for the DOE's Security Concern

As indicated above, the Notification Letter issued to the individual included a statement of the derogatory information in the possession of the DOE that created a substantial doubt regarding the individual's eligibility for access authorization. In the Notification Letter, the DOE characterized this information as indicating that the individual "has been, or is, a user of alcohol habitually to excess, or has been diagnosed by a board-certified psychiatrist as alcohol dependent or as suffering from alcohol abuse" and "has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy; or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation or duress which may cause him to act contrary to the best interest of the national security." *See* 10 C.F.R. § 710.8(j), 710.8(l). The statement was based on the individual's description of his prior alcohol use and alcohol-related arrests, as well as the November 19, 2001 diagnosis by the DOE consultant psychiatrist that the individual suffered from "alcohol abuse, which is currently in partial remission" and "has not yet shown adequate evidence of rehabilitation or reformation." DOE Exhibits 1, 4.

In requesting a hearing, the individual disputed the diagnosis by the DOE consultant psychiatrist, but did not dispute the facts surrounding his alcohol-related arrests. He stated that he was "at the present time [March 7, 2002] undergoing alcohol education and therapy. This will continue for the next 6

months I have abstained from alcohol consumption since July 4th [of 2001] and will continue to do so.” DOE Exhibit 2.

1. *Whether the Individual Suffers from Alcohol Abuse*

The DOE consultant psychiatrist cited the following as the basis for his diagnosis of Alcohol Abuse:

- C The subject shows a maladaptive pattern of use of alcohol manifested by recurrent use in situations where it is physically hazardous.
- C He has continued to use despite knowing it has a detrimental effect on his work based on his clearance.
- C At this time [November 19, 2001], following classes for his [DUI], he has not shown evidence of adequate rehabilitation. He has not yet had treatment following this DUI, and continues to not show evidence of rehabilitation.
- C He is in partial remission because he has abstained for greater than one month but less than 12 months.

DOE Exhibit 4 at 7.

In his request for a hearing, the individual states that he met with the DOE consultant psychiatrist “one time for approximately 45 minutes. Other than reviewing evidence of my driving convictions that is not enough time for anyone to form a valid medical opinion of a Mental Disorder in my opinion.” DOE Exhibit 2 at 2. At the hearing, individual stated,

I think that a valid question here is do I fit the criteria defined in the [Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)] for alcohol abuse? and that's a document that [the DOE consultant psychiatrist] referenced to back his diagnosis. My question particularly concerns the definition which is, quote, a maladaptive pattern of substance use leading to clinically significant impairment or distress as manifested by one or more of the following occurring within a 12-month period, end of quotes.

And while it's true that I've had two arrests for [DUI], they weren't within a 12-month period and that's -- let me just state that's not an excuse because what I -- you know, that was very poor judgment what I did.

Transcript of Hearing (Tr.) at 8. The DSM-IV includes the following criteria for substance abuse:

- A. A maladaptive pattern of substance leading to clinically significant impairment or distress, as manifested by one (or more) of the following, occurring within a 12-month period:

. . . .

- (2) recurrent substance use in situations in which it is physically hazardous (e.g., driving an automobile or operating a machine when impaired by substance use)
- (3) recurrent substance-related legal problems (e.g., arrests for substance-related disorderly conduct)

DSM-IV-TR at 199.

The individual is correct that his two DUIs were not within a 12-month period, and this would raise a question as to the application of the criterion relating to “recurrent substance-related legal problems.” However, this fact does not rule out the criterion describing “recurrent substance use in situations in which it is physically hazardous.” The DOE consultant psychiatrist made the point in his testimony that “the chances of drinking, driving, getting picked up, every time you do, it is pretty low.” Tr. at 45. Thus, though the individual has only been charged with DUI twice, the chances are that he has driven an automobile while impaired by alcohol more than just the two times he was caught. The individual recognized this in his testimony: “I’m not going to sit and tell you that those are the only two times that I was . . . over the limit – the legal limit. . . . I’m not going to say that that’s the only two times that I could have been caught.” Tr. at 73. Therefore, there does not appear to be any dispute that the individual meets at least one of the criteria for substance abuse, “recurrent substance use in situations in which it is physically hazardous (e.g., driving an automobile or operating a machine when impaired by substance use).”

The individual also submitted an evaluation written by a counselor at the facility where the individual had partially completed alcohol education and therapy. This counselor testified by telephone at the hearing. In her written evaluation and her testimony, the counselor did not dispute the diagnosis of alcohol abuse. Based on the above, I accept as accurate the DOE consultant psychiatrist’s diagnosis of alcohol abuse.

2. Whether the Individual Has Been a User of Alcohol Habitually to Excess

In its Notification Letter, the DOE states that “[d]uring a personnel security interview (PSI) conducted on August 23, 2001, [the individual] indicated that he became intoxicated a couple of times a week and that it took three to four beers to become intoxicated.” DOE Exhibit 1 at 3. In his request for hearing, the individual states, “I do not think I ever said that I drank to the point of ‘intoxication’ unless intoxication means that my blood alcohol content (BAC) was over the legal limit [in my jurisdiction].” DOE Exhibit 2 at 2.

During the PSI in question, the DOE personnel security specialist asked the individual, “Did you feel intoxicated that night [of the July 2001 DUI]?” The individual responded, “Slightly, yes,” and the personnel security specialist then asked, “And how often do you become intoxicated?” The individual responded, “Um, well since [the July 2001 DUI] I haven’t, prior to that a couple of times a week maybe.” DOE Exhibit 5 at 12-13.

The term “user of alcohol habitually to excess” is not a term of art used in psychiatry or substance abuse treatment. Nor is the term defined in the Part 710 regulations, even though it is only in the context of personnel security that the term is regularly used. Arguably, drinking to the point where one’s judgment is impaired is “excessive,” since the DOE must depend on the intact judgment of a clearance holder at all times.

Using this definition, I find that the individual was, prior to his second DUI, a user of alcohol habitually to excess. Whatever the individual’s definition of intoxication, the individual described himself as being “slightly” intoxicated on a night that he was arrested for DUI. But this slight intoxication apparently affected the individual’s judgment such that he made the bad decision to get behind the wheel of a car. And the individual applied the same term, “intoxicated” to his condition “a couple of times a week maybe” prior to the arrest.

B. Whether the Security Concerns Have Been Resolved

A hearing under Part 708 is held “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization,” i.e., “to have the substantial doubt regarding eligibility for access authorization resolved.” 10 C.F.R. § 710.21(b)(3), (6). “In resolving a question concerning an individual’s eligibility for access authorization,” I must consider

the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors.

10 C.F.R. § 710.7(c).

In the present case, the only significant concern raised by the DOE relates to the individual’s use of alcohol.² The individual has testified credibly that he has abstained from using alcohol since his July

² The Notification Letter also notes that the individual was arrested nearly 32 years ago for “Burglary and Conspiracy . . . and that he was sentenced to one year probation.” Because this isolated incident occurred when the individual was 19 years old, and is so remote in time, I find that it does not raise a security concern regarding the individual.

3, 2001 DUI arrest. Tr. at 8. He also presented the testimony of his wife, who testified credibly in corroborating the individual's claim of abstinence. Tr. at 64. Further bolstering the individual's account is the fact that he has been subject to random urinalysis since December 2001, and each time the test has come back negative. Individual's Exhibit 2.

Because the individual presents no security concern so long as he continues to abstain from using alcohol, the critical factors in this case are the absence or presence of rehabilitation and the likelihood of recurrence of the individual's habitual and excessive drinking. Regarding his risk of relapse, the counselor who testified for individual stated, "Will he relapse? I don't think so. It did not appear to me that alcohol was that huge of a thing for him." Tr. at 40. The DOE consultant psychiatrist considered the individual's risk of relapse as "low . . . if it was a category. It would be more mild than moderate and high. So I'd put it in mild. So I think he's at low risk for relapse. . . . Mild, more than minimum." Tr. at 95-96. This testimony, by itself, indicates to me that the individual is likely not to relapse.

But considering other factors noted by the counselor and the psychiatrist, there still appears to be a significant risk of relapse. First, both the counselor and the DOE consultant psychiatrist recommend that the individual not continue to frequent places where alcohol is served. The individual has not adopted their recommendation. The counselor testified that "if it were me and I had two DUIs and had lost my security clearance, I would find different ways to recreate. When there's that many negative consequences, it just isn't worth it. So that would be my opinion." Tr. at 40. The DOE consultant psychiatrist stated, "I think, though it's not imperative, is that it will be hard to not relapse at some point if he continues to go to bars -- karaoke, pool -- especially if [the individual's wife is] drinking." Tr. at 65.

The individual responded to these recommendations with the following statement:

On what basis would you have to say that it would be hard for me not to relapse because I was there? That's -- that's implying that if I get around people who are drinking alcohol, I'm not going to be able to help myself. I'm going to have to drink. I do not think that's the case.

Tr. at 65-66.

The fact that the individual continues to go out with his wife while she is drinking raises two concerns. First, as both the counselor and the psychiatrist testified, continuing this pattern increases his risk of relapse. Second, it is not clear to me that the individual fully understands this increased risk. The DOE consultant psychiatrist addressed this issue when he described what he called a "relapse prevention plan."

What do you do if you're in a situation where such and such happens? So let's say he drinks when he's in a fight with his wife. What is he going to do? So he has to have a plan of what he's going to do. So let's say his fight with his wife, he ends up in bar. What's he going to do at that point? Let's say he has drink in his hand. What's he going to do?

So a relapse prevention plan, which you [indicating the individual] might or might not have learned yet, has to take into account how he's going to prevent drinking or relapse or what's he going to do if he does have a drink? And that was important for him to know.

....

I think you're not up to that in your [alcohol education] classes yet . . . that relapse prevention plan that they should be working with you on.

....

It would start from the beginning with not drinking, which is his intention, which is the recommendation of counselors that he has.

....

There also -- let's see -- there are recommendations also that he not go to karaoke bars. No bars.

....

So his relapse prevention plan, if he worked on it, if he was aware that he was supposed to work on it, would be, What do you do when you're invited to a karaoke bar? Where do you find a dry one? There must be a dry one in [his area] somewhere I would guess. What do you do when you're in the karaoke -- when the person insists that you go?

What do you do when the person you're with -- it's going to be his wife -- starts drinking? What are you going to do when someone offers you a drink? What are you going to do when there's a drink in your hand? What are you going to do when there's a drink at your lips?

And that for him, especially, What are you going to do with your car keys or what are you going to do when you're sitting in your car? What are you going to do when you insert the key into the ignition and what are you going to do when you're a block away? Are you going to measure -- well, How many did I have to drink? or are you just going to get out of the car because it's too high of a risk to run?

So it should involve every step of the way what is it he's going to do if he makes one more mistake? What do you do after you've drank and drove and gotten away with it?

....

Are you going to turn a lapse into a relapse?

My concern -- and I still don't -- my concern is that he -- I don't think he's recognized the danger in any of these steps, except the last one, which puts him more of a risk. That doesn't mean that it's inevitable that he's going to relapse, but it does put him at risk that he's not -- seemingly not willing to make a change at the beginning of his plan.

Tr. at 77, 80-82.

Considering all of the above, I believe that the risk of the individual relapsing, i.e., returning to drinking to levels that impair his judgment, is too high at this time. I am concerned that the individual does not yet fully understand the magnitude of the challenges he faces. It is entirely possible that, with the completion of his alcohol education classes (which, at the time of the hearing, were still in progress), the individual will better understand the risks he faces and be better equipped to handle them appropriately. At this point, however, if I am to err in making this predictive assessment, I must err on the side of national security. *See* Department of Navy v. Egan, 484 U.S. 518, 531 (1988) (“clearly consistent with the national interest” standard for granting of security clearances indicates “that security determinations should err, if they must, on the side of denials”). With this in mind, I cannot recommend that the individual’s clearance be restored at this time.

III. Conclusion

Upon consideration of the record in this case, I agree with the DOE that there is evidence that raises a substantial doubt regarding his eligibility for a security clearance, and I do not find sufficient evidence in the record that resolves this doubt. Therefore, because I cannot conclude that restoring the individual’s access authorization would not endanger the common defense and security and would be clearly consistent with the national interest, it is my opinion that the individual’s access authorization should not be restored. 10 C.F.R. § 710.27(a). The individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: August 9, 2002